Supreme Court, U.S.
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No. _____

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In The

**Supreme Court of the United States**

October Term, 1995

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TERRY HASENSTAB,

*Petitioner,*

v.

THE CITY OF NEW YORK, et al.,

*Respondents.*

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**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Second Circuit**

# PETITION FOR WRIT OF CERTIORARI

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Terry Hasenstab
Petitioner
42 Peconic Drive North
Massapequa, New York 11758
(516) 795 3877

56 pp

## INTRODUCTION TO QUESTIONS

Petitioner, a former police officer, was disqualified from promotion to sergeant by the New York City Police Department; owing to service-related injuries. Without his ever having been given notice of that event.

Petitioner commenced prior state and federal actions based upon that "same transaction," which were dismissed; but, were not brought pursuant to the events and evidences presented in the instant action. Subsequent to those dismissals, the state action was renewed and Petitioner prevailed on the merits of his claims; but, owing to a change in New York judicial law -- he was precluded from obtaining relief in that forum. And, thereafter, he commenced the present action.

Although the instant action was brought pursuant to different, subsequent events, and the evidences thereof, the Second Circuit concluded that Petitioner had relied upon them in his previous state and federal actions. And, it sanctioned the same finding by the district court. In addition, Petitioner contends that the Second Circuit ignored asserted precedents established by this Court; as well as its own.

## QUESTIONS PRESENTED

1. Whether the Second Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power?

2. Whether the Second Circuit erred when it affirmed the district court's determination; that Petitioner's first federal

action barred his present claims, and the issues raised therein?

3. Whether the Second Circuit erred when it determined that Petitioner's prior state action barred his present claims, and the issues raised therein? In its decision, the district court had determined that it need not reach that question.

4. Whether the issue of Petitioner's claim to a federally-protected property interest, was fully and fairly litigated in the prior courts? Whereas, the state courts were barred from finding that he possessed such an interest; and, could not award the relief sought.

5. Whether the State of New York provided Petitioner with an adequate postdeprivation remedy, for the adjudication of his federal claims, in accordance with due process? Whereas, he was denied predeprivation notice and an opportunity to be heard.

6. Whether the Respondents' actions in the state court proceedings interfered with Petitioner's due process rights; whereas, they intentionally misrepresented that the New York City Police Department did not, and could not promote injured officers, to enhance their medical pensions? Which the Appellate Division relied upon in its determination. And, accordingly, did Respondents' actions present a new injury and cause of action as to Petitioner?

7. Whether or not Petitioner has judicial standing in Federal forum to assert due process and equal protection violations?

## LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Second Circuit:

1. Terry Hasenstab, Appellant/Petitioner;
2. The City of New York, Appellee/Respondent;
3. The Corporation Counsel for the City of New York, Appellee/Respondent;
4. The New York City Police Department, Appellee/Respondent;
5. The Board of Trustees of the Police Pension Fund, Article Two, Appellee/Respondent;
6. Edward I. Koch, Appellee/Respondent;
7. David Dinkens, Appellee/Respondent;
8. Frederick A.O. Schwarz, Jr., Appellee/Respondent;
9. Peter L. Zimroth, Appellee/Respondent;
10. Victor A. Kovner, Appellee/Respondent;
11. O. Peter Sherwood, Appellee/Respondent;
12. Elizabeth Logan, Appellee/Respondent;
13. Suzanne Bailey, Appellee/Respondent;
14. Jeanette Ruiz, Appellee/Respondent;
15. Leonard J. Koerner, Appellee/Respondent;
16. Fay Leoussis, Appellee/Respondent;
17. Deborah R. Douglas, Appellee/Respondent;
18. Robert J. McGuire, Appellee/Respondent;
19. Benjamin Ward, Appellee/Respondent;
20. Lee Patrick Brown, Appellee/Respondent;
21. Raymond Kelly, Appellee/Respondent;
22. Joseph Preiss, Appellee/Respondent;
23. Joan Preston, Appellee/Respondent;
24. Leonard Kaplan, Appellee/Respondent;
25. John Bnettner, Appellee/Respondent.

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The opinion delivered by the Court of Appeals in this case was not published. A copy of the opinion is presented at pages App. 1 to 6. The opinion of the District Court for the Southern District of New York appears at pages App. 7 to 11.

## OPINIONS OF OTHER COURTS

1. *Hasenstab v. The City of New York, et al.*, 664 F. Supp. 95 (S.D.N.Y. 1987).

2. *Hasenstab v. McGuire*, 577 N.Y.S.2d 598 (N.Y. App. Div. 1st Dep't., 1991).

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## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Second Circuit was filed on January 17, 1996. App. at 1-6. An order denying Rehearing, suggested in banc, was filed on March 19, 1996. App. at 12-13. On April 17, 1996, The Honorable Justice Ruth Ginsburg extended the time in which to file the petition for a writ of certiorari to, and including July 17, 1996. Application #855. This Court's authority to review the judgment in question, by writ of certiorari, is conferred by 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. 28 U.S.C. §1343; 42 U.S.C. §1983, §1985 and §1986. §50(4) and §50(10) of the New York Civil Service Law. §13-206(d) of the New York City Administrative Code and Rule 4.3.2 of the New York City Personnel Director. App. at 15-18.

## STATEMENT OF THE CASE

Your Petitioner, TERRY HASENSTAB, respectfully prays that this Court grant him summary disposition; based upon the merits of the within petition. Or, that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit. Which has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power.

## FEDERAL JURISDICTION

The district court's jurisdiction was invoked pursuant to 28 U.S.C. §1343(a)(1)(2)(3); 42 U.S.C. §1983, §1985, §1986 and the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioner alleged deprivation of his constitutional rights to due process and equal protection in the district court and alleged that the courts of New York State failed to provide him with an adequate postdeprivation remedy for his federal grievance in contravention to this Court's mandate in *Parratt v. Taylor*, 451 U.S. 527 (1981),

in order to have pretermitted the normal predeprivation notice and opportunity to be heard; which was not accorded to Petitioner in this matter.

## FACTS

Petitioner was appointed to the New York City Police Department ("NYPD") in 1964. In 1978, he took an examination for sergeant and failed. Thereafter, on May 5, 1982, Petitioner was seriously injured in the line-of-duty. Pursuant to the rescoring of that exam, a new list of eligibles was published to the NYPD on July 20, 1983. Although Petitioner's name appeared on that list, he was neither informed of that fact, nor was he notified, pursuant to §50(4) of the New York Civil Service Law (App. at 17), that the NYPD had medically disqualified him from promotion to sergeant in August of 1983. Pursuant to its initiative, the NYPD retired Petitioner on August 31, 1983.

Subsequently, Petitioner learned of his disqualification and commenced an Article 78 of the New York Civil Practice Law and Rules ("CPLR") action in the New York State Supreme Court ("motion court") during the life of his eligible list ("*Hasenstab I*"), based upon a hint he had received that the NYPD promoted injured officers, despite their disabilities. Due to a complete lack of evidence to support Petitioner's claims as well as Respondents' denial that the NYPD had ever promoted injured officers, the motion court dismissed his petition and rejected a motion to renew for the same reasons.

Petitioner commenced his first federal action in August of 1986 ("*Hasenstab II*") pursuant to the only claims he was cognizable of then; *i.e.* that the NYPD had violated his federal due process rights by "not having notified him that

he had passed the rescored exam and had been disqualified from promotion to sergeant" and "that the NYPD promoted injured officers," although Petitioner did not possess evidence to support such a claim. Subsequently, Petitioner discovered the events, albeit not with the evidence thereof, which gave rise to renewal of his state action. Despite the fact that Respondents had contended otherwise, the NYPD had promoted five seriously injured officers: Terence McTigue; Michael Duffy; Anthony Senft; Rocco Pascarella and Salvatore Pastorella (collectively, hereinafter, "McTigue and the others"), all of whom had been permitted to remain with the NYPD subsequent to their promotions.

Petitioner moved the motion court for renewal, challenging, once again, the NYPD's decision not to accord him equal treatment. In addition, when Petitioner obtained McTigue's medical records in 1987, he raised his claims of federal due process and equal protection violations in that court. At that time, Petitioner did not possess the proofs that were submitted to the district court in the instant action which demonstrate his different, present claim, that the NYPD promotes injured officers "simply to increase their medical pensions." These events occurred subsequent to *Hasenstab II* and both just before, and subsequent to the State Court Appellate Division action in 1991. They depict the promotions of three seriously injured and one deceased officer: Mary Buckley; Daniel McCormick; Armando Flores and William Gunn, all of whom were promoted simply to increase their medical pensions.

Meanwhile, Respondents had moved for dismissal before the *Hasenstab II* court, pursuant to Fed. R. Civ. P. 12(b)(6); alleging res judicata attachment to *Hasenstab I*. It should be noted however, that none of the evidence of the events particular to McTigue and the others, Buckley,

McCormick, Flores, Gunn, Gerard Simpson and Edward Mamet were ever before the *Hasenstab II* court. The chronological occurrences of the events particular to Buckley (1990), McCormick (1990), Flores (1994) and Gunn (1995), concomitant with the times of Petitioner's access to the evidences particular to McTigue (1987) and the others (1990) demonstrate that contention. Simpson and Mamet, not previously mentioned herein, received four civil service promotions, collectively, and were permitted, subsequent thereto, to remain with the NYPD, although each individual had been injured and was disabled. Petitioner discovered the evidence of those events in September of 1991.

In June of 1987, prior to the state court's ruling on Petitioner's motion to renew, the *Hasenstab II* court dismissed his complaint. The court finding that *Hasenstab II* was barred by the judgment in *Hasenstab I. Hasenstab v. The City of New York*, 664 F. Supp. 95 (S.D.N.Y. 1987). The court held that Petitioner could have raised his Federal Constitutional claims in the state proceeding and had those claims adjudicated in that forum.

Subsequent to that court's ruling, *supra*, and prior to entry of its judgment, Petitioner's attorney was notified by the "state" Judge's staff, that renewal was granted and that Petitioner's matter would be remanded to the NYPD, directing it to reconsider the decision not to promote him. In addition, the court ordered Respondents to turn-over the medical, promotion and retirement records of several injured officers to Petitioner. Because he had prevailed in the state action, and was no longer aggrieved, accordingly, Petitioner did not appeal the judgment of the *Hasenstab II* court. Before the NYPD had reconsidered its decision not to promote Petitioner, the New York State Court of Appeals decided *The Matter of Deas v. Levitt*, 73 N.Y.2d 525, 539

N.E.2d 1086, 541 N.Y.S.2d 958, *cert. denied*, 493 U.S. 933 (1989).

In November of 1989, pursuant to service of Petitioner's "Demand For Compliance" with the motion court's order, he received notice from the NYPD that it had reconsidered, and decision was not to promote him due to *Deas, supra*, because his eligible list had expired in 1984. At that time, the NYPD did not turn-over the records of the injured officers to Petitioner; as the motion court had ordered it to.

Before *Deas, supra*, state appellate courts had granted relief in matters such as Petitioner's. *See Deas v. Levitt*, 139 A.D.2d 1 (1988). Accordingly, *Deas, supra*, effected a change in New York judicial law. *See Deas v. Levitt*, 73 N.Y.2d 525, 530-531 (1989). This change swallowed Petitioner's federal claims and judicial standing in the state courts; due solely to the expiration of his eligible list, even though Petitioner's federal property interests were created by the NYPD's conduct; pursuant to its promotions of the other injured officers.

Sometime after June 12, 1990, in response to a contempt motion brought by Petitioner, Respondents turned-over the records of the injured officers to him; as the motion court had ordered. However, in August of 1990, the motion court dismissed Petitioner's state action; because his eligible list had expired during the pendency of the litigation.

Thereafter, Petitioner appealed to the Appellate Division of the New York State Supreme Court. Subsequent thereto, it was hinted to Petitioner that the NYPD had promoted injured officers who were in the process of retiring, to increase their medical pensions. At that time, Petitioner

did not possess the evidence that would have supported such a claim. It was not until September of 1991, that Petitioner obtained the evidence pursuant to Buckley, Simpson and Mamet. Although they had been seriously injured and were disabled, Simpson and Mamet were promoted and allowed to remain with the NYPD. Buckley had been promoted "to increase her medical pension." During oral arguments in the Appellate Division, on October 8, 1991, Petitioner's attorney handed-up to the panel, the evidence of their promotions, over the objection of Respondents' counsel. Albeit that, that evidence and Petitioner's claims thereto, *dehored* the "certified" record before that court.

Despite the fact that the NYPD had already promoted Buckley and McCormick in 1990, solely to have increased their medical pensions, Respondents pleaded to the Appellate Division Justices:

> "[a]s to Petitioner's unsubstantiated allegation, that he was denied equal protection because other officers were promoted under similar circumstances, those assertions are unsupported by the record or by Petitioner's affidavits and documents *dehors* the record submitted, over my objections, to the panel at oral argument, and served on me only during that argument. None of Petitioner's examples involved officers who were promoted after they had applied for accident disability, and had been determined by the Medical Board to be medically unfit. Finally, the Police Department does not, and cannot promote officers, simply to increase their medical retirement pensions, the purpose of which is to acknowledge past service. Nevertheless, Petitioner, utterly, without legal basis wants the department to recompute his pension based upon a rank to which he was never

promoted, nor worked one day..." (Respondents' "official" letter of October 15, 1991, to the Appellate Division.)

The promotions of Buckley, McCormick and Flores are the "smoking guns" of the NYPD's clandestine practice, whereby they promote injured officers, simply to increase their medical pensions. Gunn's promotion is the "crowning" evidence of that practice.

Although Respondents pleaded otherwise in their letter to the Appellate Division, the NYPD elevated Gunn to detective, posthumously, in December of 1995, simply to increase his pension benefits, although Gunn had neither been officially promoted to detective, nor did he work one day in that rank. ABC-TV provided television coverage of that event and reported, pursuant to commentary of an NYPD spokesperson, that Gunn had been promoted three years after his death, for the purpose of recomputing his beneficiary's pension. This opposes Respondents' pleadings to the Appellate Division and confronts the propriety of the refuge of res judicata granted them by the Second Circuit; owing to their repugnant, belied assertions to that court. Given that, Respondents were under a legal duty to have been truthful in their verified answers to the Appellate Division. The Appellate Division affirmed the motion court's judgment by vote of three to two. The dissenting Justices held that Petitioner had been denied procedural due process. *Hasenstab v. McGuire*, 178 A.D.2d 217, 226-27 (1991). The majority opinion held that *Deas*, *supra*, barred the relief sought. *Hasenstab*, *supra* at 220.

Despite their irrefutable knowledge of the serious medical conditions pursuant to McTigue and the others (who are the only individuals mentioned herein, that were part of

the record before the Appellate Division), Respondents stated to the Appellate Division that those individuals had merely been on "sick leave," when their respective promotions took place, which suggested that they would recover from their injuries. Respondents exacerbated that belied assertion, when they denied that the NYPD had ever promoted injured officers to increase their medical pensions, although the NYPD had already promoted Buckley and McCormick, for that precise purpose.

McTigue was blinded in his left eye, when a bomb another officer was dismantling, detonated; Senft was blinded in his right eye in a similar event; Duffy suffered numerous bone fractures as the result of an auto accident; Pascarella and Pastorella were both seriously injured pursuant to bomb detonations; Petitioner suffered fractures to his lower back and right ankle, multiple herniated discs of his cervical and lumbar spine, as well as tears to the cartilage and ligaments of his right knee. Surgical intervention was necessary to neutralize his lower back and knee impairments; Buckley was shot in the mouth; McCormick sustained a disabling knee injury; Flores suffered a heart attack and was promoted the next morning at his hospital bedside. Even though the NYPD knew he would retire, accordingly, on a seventy-five percent medical pension; Simpson and Mamet each sustained serious leg injuries in off-duty incidents, and required partial amputations.

Respondents abridged Petitioner's fundamental, constitutional right to due process in the state forum. Based upon their mendacious pleadings to the Appellate Division, that court's majority rejected the "true" claims Petitioner had advanced therein. This contention is drawn from the memorandum of that court. The majority opinion of the Court stated:

> "...[a]lthough the dissent makes reference to officers who have been promoted while suffering from disabling injuries, the record indicates these officers (McTigue and the others) were on sick leave. There is nothing to indicate any person has ever been promoted by the department, after the medical board has recommended approval of the application of such person for accident disability retirement (material in parenthesis added)...." *Hasenstab v. McGuire*, 178 A.D.2d 217, 222 (1991).

The Appellate Division dissenting Justices correctly concluded from the record before it, that McTigue had been promoted to a competitive position after he had sustained his disabling injuries. The dissenting Justices noted that conclusion in the Court's Memorandum:

> "...[t]he department urges that it was prohibited from promoting petitioner since he had sustained two disabling line-of-duty injuries and, based on those injuries, had a pending retirement application, which it should be noted, the Police Surgeon directed him to file. This cannot, without more be relied upon, in view of the department's promotion to a position subject to a competitive examination of at least one other person (McTigue) who, at the time of his promotion, was physically disabled..." (*See* dissent, *Hasenstab v. McGuire,* 178 A.D.2d 217, 226 (1991); material in parenthesis added.)

Thereafter, Petitioner appealed to the New York State Court of Appeals. Despite their unequivocal knowledge of the veracity of the dissenting Justices' finding, *supra*, and that Duffy, Senft, Pascarella, Pastorella, Buckley, McCormick,

Simpson and Mamet had all been promoted, after they had sustained their disabling injuries, Respondents stated the following to the Court of Appeals:

> "...[t]he dissent would remand this proceeding for a determination as to whether Respondents' decision not to promote petitioner was arbitrary and discriminatory, based upon its [unsupported] belief that at least one other person who, at the time of his promotion, was physically disabled. The documents which petitioner submitted *dehors* the record at oral argument in the Appellate Division, over my objection, merely show that some officers had been promoted while on sick leave, as the majority correctly noted...[P]etitioner's letter to this court is replete with assertions outside the Record, *i.e.*, the physical conditions of other officers and detectives who were allegedly promoted..." (Respondents' "official" answer of March 5, 1992, to the New York State Court of Appeals. Brackets added to emphasize "unsupported".)

Petitioner brought Respondents' prevarications, *supra*, to the attention of the Court of Appeals, as well as those they had offered-up to the Appellate Division. Nevertheless, that court affirmed the Appellate Division's decision, for the reasons set forth in the Appellate Division's memorandum. *Hasenstab v. McGuire*, 80 N.Y.2d 812 (1992). Afterward, Petitioner filed a motion to reargue, which the court denied. *Hasenstab v. McGuire*, 80 N.Y.2d 926 (1992).

Thereafter, Petitioner sought a writ of certiorari, which this Court denied. ___U.S.___ 113 S.Ct. 1947 (1993). Respondents set forth to this Court, the identical prevarications they had advanced to the Court of Appeals.

Petitioner commenced the instant proceeding in the Southern District of New York, in August of 1993. Raising therein, his claim to unresolved federally-granted property interests in promotion to sergeant.[1]

Respondents motioned for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), alleging res judicata and collateral estoppel attachments to both *Hasenstab I and II*.[2] The district court dismissed Petitioner's complaint on July 25, 1994, finding his claims therein to be identical to those in *Hasenstab II*; that they were precluded under res judicata and collateral estoppel. Accordingly, the court did not reach the questions of whether these claims were also precluded by Petitioner's state court judgment or whether they were time-barred. Thereafter, Petitioner filed a Fed. R. Civ. P. Rule 59./60. motion contesting the court's determination. Subsequent thereto, Petitioner discovered the evidence of McCormick's and Flores' promotions and he brought them to the district court's attention, with an "amended" motion and "supplemental" pleading.

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[1]The NYPD created, as to Petitioner, federally-protected property interests in their following practices: (1), to have been promoted to sergeant and permitted to remain with the department thereafter; or (2), to have been promoted for the purpose of increasing his medical pension, prior to his retirement, or subsequent thereto, by recomputing his pension; as was Gunn's.

[2]Respondents reuttered the identical prevarications to the district court, that they had offered up to the prior courts; "...[t]he documents relied upon by plaintiff merely show that some officers were promoted while on sick leave (Memorandum of Law dated January 19, 1994)...." Which, pursuant to the medical conditions of the officers mentioned herein, they had to have known were fallacious.

In opposition to Petitioner's Rule 59./60. motion, Respondents offered-up the following nefarious statement to the district court:

> "...[p]laintiff could have raised all his claims in *Hasenstab II*, based upon the evidence he presented as to five officers he alleged were wrongfully promoted..." (P.7, "Respondents' Memorandum of Law," dated January 10, 1995.)

The five officers who Respondents referred to, *supra*, are McTigue and the others. Petitioner could not possibly have presented the evidence of their medical conditions to the *Hasenstab II* court; as Respondents nefariously, misstated.

Firstly, Petitioner did not obtain the evidence pursuant to McTigue's medical condition, until after *Hasenstab II* had been commenced and which was finally decided on June 26, 1987. Secondly, although the motion court had ordered the NYPD to turn-over the medical and promotion records of the others to Petitioner in 1987, they refused to do so.[3] Not only could the records of those five officers not have been before the *Hasenstab II* court, Petitioner could not have raised his claims as to them in that court because those events took place subsequent to *Hasenstab II*, as Respondents are well aware. Simply stated, the chronologies of these events should have vitiated Respondents' pleading to the district court, "that Petitioner could have raised all his claims...in *Hasenstab II*" and accordingly quashed their "asserted" right to res judicata attachment of *Hasenstab II*, to the instant

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[3]It was only after Petitioner had moved before the motion court to hold Respondents in contempt, for their not having turned-over the records of the other officers to him, that they complied with its order. And, that was subsequent to Petitioner's execution of Respondents' "Stipulation of Confidentiality," which took place on June 12, 1990.

action. Petitioner submitted the entire record of the motion court's proceedings to the district court which demonstrated his contentions, *supra*. Despite the fact that, that evidence refuted Respondents' nefarious assertion, as to the five officers, *supra*, as Petitioner had contended, the district court ruled otherwise.

Although the events particular to McTigue and the others had had no bearing on Petitioner's claims in the district court, he submitted their documentations to it, to simplify distinction of his claims therein (that Buckley, McCormick, Flores and Gunn had all been promoted, simply to increase their medical pensions), from those he had advanced to the *Hasenstab I* court (pursuant to McTigue and the others. All of whom had been permitted to remain with the NYPD, at length, subsequent to their promotions).

Given that the evidences of the NYPD's policies, *supra*, had been discovered by Petitioner at different times, and persuaded the existences of two independent practices, pursuant to their promotions of physically disabled officers, each gave rise to an independent cause of action as to him.[4] And those NYPD practices indentured Petitioner with federally-protected property interests, in the treatments they accorded to the other officers mentioned herein. Although they had been promoted under circumstances that might have presented an impression of a similar label, the physically disabled officers mentioned herein, were promoted for two distinctly, different purposes. Despite the fact that the memorandums of the prior courts opposed its finding, the district court dismissed Petitioner's case, and rejected his

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[4]Petitioner could not have raised his claims pursuant to Buckley, McCormick, Flores and Gunn, in either *Hasenstab I or II*; based upon the times of Petitioner's access to their evidentiary proofs and, owing to the respective chronologies of their events.

Rule 59./60. motion on April 21, 1995. Plainly, the district court subverted the very process that was placed into position, to correct obvious oversights called to the court's attention. The Appellate Division memorandum in *Hasenstab I*, 178 A.D.2d 217 (1991), upon which the New York Court of Appeals relied in its determination, is "hard" evidence that those courts neither received evidence of, nor considered a legally competent claim (within the record) by Petitioner, that the NYPD promoted injured officers, simply to increase their medical pensions. Concomitantly, "none" of the evidence of the events mentioned herein, was ever before the *Hasenstab II* court. 664 F. Supp. 95 (1987). Accordingly, that court, as well, could not have considered a claim identical to any that were before the district court, in the instant action.

Thereafter, on May 19, 1995, Petitioner filed notice of appeal with the United States Court of Appeals for the Second Circuit. Petitioner set forth to the Second Circuit, his claim to a federally-granted property interest in promotion to sergeant, *i.e.* that property had been snatched from him, without either predeprivation notice or adequate postdeprivation remedy in the courts of New York State, and that neither *Hasenstab I*, nor *Hasenstab II* were bars to the instant action; by reasons of the following: (1), That Petitioner could not have raised his claim to a higher medical pension in the motion court, prior to the Appellate Division's and Court of Appeals' reviewals of that court's judgment. Owing to the chronological sequences of Petitioner's discoveries of both the events that supported that claim, and his access to the proofs thereof. (2), That subsequent to the *Hasenstab II* proceeding, a "change" in New York judicial law precluded Petitioner from having his federal claims adjudicated in the state courts. And (3), that none of the events and evidence thereof, which were before the

*Hasenstab I* court, and the district court in the instant action, were ever before the *Hasenstab II* court.

Although they were under a duty to have been truthful to that court, Respondents advanced to the Second Circuit the identical prevarications they had uttered to the prior courts. That "the documents Petitioner relied upon (pursuant to the medical conditions of the officers mentioned herein), to demonstrate his claim that other [disabled] officers had been promoted, merely show they were promoted while on sick leave" (f.n., P.9, Respondents' letter of September 14, 1995, to the Second Circuit).[5]

Collectively, these repeated, belied assertions, on the part of Respondents, demonstrate a facinorous posture by them, to defeat, unlawfully, Petitioner's "true" claims to the courts in these proceedings, which undermined his sacred right to due process, sterile of Constitutionally-repugnant behavior. Considering their conduct, the shielding of Respondents by the courts below, with the refuges of res judicata and collateral estoppel is extraordinary and runs contrary to accepted, fundamental judicial proceedings.

On January 17, 1996, the Second Circuit affirmed the lower court's decision. Finding both *Hasenstab I and II* to be res judicata and collateral estoppel bars to the instant action. Citing *NLRB v. United Technologies Corp.*, 706 F.2d 1254

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[5]Respondents also stated, malevolently, to the Second Circuit, that "Petitioner had actively pursued medical retirement." And, that "he failed to commence his state proceeding, during the life of his eligible list" (P.2,4 Respondents' Letter, *supra*). When they knew Petitioner had been directed by his Police Surgeon to file for medical retirement; and, had, in fact, commenced his state proceeding, during the life of his eligible list. The Appellate Division noted these precise findings in its memorandum. *See Hasenstab v. McGuire*, 178 A.D.2d 217, 226 (1991).

(2d Cir. 1983) as its authority, the court rejected Petitioner's res judicata retort.[6] In support of its determination, the Second Circuit stated that:

> "Res judicata operates as a bar to subsequent actions involving the same transaction, where the same evidence is relied upon, and where the facts essential to the second action were present in the first." App. at 5. *NLRB, supra,* at 1260.

By order dated March 19, 1996, the Second Circuit denied rehearing, with suggestion that the action be reheard in banc, App. at 12, although Petitioner had urged the court with clear evidence that the record before it opposed its finding, *i.e.* Petitioner urged that the facts essential to the present action were not present in the prior proceedings and that the evidence Petitioner relies upon in the instant action was not relied upon by him in the prior courts.

## REASONS FOR GRANTING THE PETITION

This Court must invalidate the Second Circuit's imprudent departure from the accepted and usual course of judicial proceedings. Whereas, that court rejected Petitioner's soundly demonstrated proof, that it had misapprehended the facts in his case in addition to ignoring controlling precedents of this Court, as well as its own. And pursuant to that abridgment, the court annulled the indispensable process placed into position, to safeguard

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[6]The Second Circuit concluded, incorrectly, that Petitioner is suing in the present case, under the same operative facts as existed in *Hasenstab I and II*, as Respondents had disingenuously urged it. App. at 5. The court also noted, pursuant to Respondents' mendacious urging, that the other officers had merely been on sick leave when their promotions took place, although they were all, in fact, disabled at those times.. App. at 4,

plaintiffs' due process rights to challenge erroneous decisions in that court, in addition to that court's sanction of the district court's same departure. This, collectively, calls for an exercise of this Court's supervisory power.

Although Petitioner's companion points rise to the level that impeaches the Second Circuit's decision, this appeal presents squarely, the questions of whether or not he relies herein upon the same evidence he relied upon in the prior proceedings and whether or not the facts essential to this action, were present in those prior proceedings. Standing alone, Petitioner's irrefutable proofs as to these issues, impeach the Second Circuit's decision.

Clearly, Petitioner has demonstrated herein (P. 4-5, 6-8, 12, 14), that the evidence he presently relies upon, in support of his claim to a higher medical pension (pursuant to the promotions of Buckley, McCormick, Flores and Gunn), was not relied upon by him in *Hasenstab II*, due to the times that these events took place. *Hasenstab II* concluded in 1987. These events took place not less than three, and up to eight years after that action.[7] Accordingly, the facts essential to Petitioner's present federal action (pursuant to these officers, *supra*) were not present in the "first."

Furthermore, "none" of the evidence which were before the *Hasenstab I* court (pursuant to McTigue and the

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[7]Not only did the events giving rise to the two proceedings occur at substantially different times, they involved different NYPD conduct, as well (demonstrated to the Court on P. 14 herein). Plainly, the claim at issue here could not have been adjudicated on the basis of the events, facts, or evidence involved in *Hasenstab II*. Owing to issues that were identical to these, the court in *NLRB v. United Technologies Corp.*, *supra*, concluded in that proceeding, that that action was not barred by the prior judgment; for those reasons. *Id.* at 1260.

others) and the district court in the instant action (pursuant to Buckley, McCormick, Flores and Gunn), were ever before the *Hasenstab II* court. Copies of Petitioner's Article 78 petition, and his first motion seeking renewal, were the only documents before the *Hasenstab II* court and they were devoid of evidence that would either prove Petitioner's instant claims or his then state court claims. *See Hasenstab v. City of New York*, 664 F. Supp. 95, 97 (1987). Plainly, therefore, Petitioner could not have raised his present claims in *Hasenstab II*.

The facts in this case are clearly inapposite to the controlling principles of res judicata established in the Second Circuit's *NLRB* ruling. *See NLRB, supra* at 1260; App. at 5. Clearly, the events which are the matrix of Petitioner's protected interest in a higher medical pension (pursuant to Buckley, McCormick, Flores and Gunn), "postdated" *Hasenstab II*. In its conclusion, that the prior *NLRB* action was not res judicata to that subsequent proceeding, the Second Circuit cited this Court's decision of *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). For its stated principle that:

> "...judgment in antitrust suit does not preclude later suit based on 'essentially the same course of conduct.' Where conduct in second suit postdated the first judgment." *NLRB v. United Technologies Corp.*, *supra* at 1260.

In Petitioner's case, however, the Second Circuit ignored this Court's ruling of *Commissioner v. Sunnen*, *supra*, which had been cited as precedential authority. Even though the NYPD's conduct demonstrated in this second federal suit, clearly postdated the first judgment, which underscores Petitioner's claim that the Second Circuit's

decision and rejection of his demand for rehearing was unsound.

Furthermore, the Second Circuit should have vitiated the district court's findings as to the evidence in this matter. Whereas, instead of viewing the evidence in the light most favorable to Petitioner, as the party against which the motion was made, *Metromedia Co. v. Fugazy*, 983 F.2d 350, 361 (2d Cir. 1992), the district court accepted, instead, Respondents' belied assertion, that Petitioner could have raised all his claims in *Hasenstab II*, based upon the evidence he presented as to McTigue and the others, which, as Petitioner has demonstrated herein (see P.12-14), was clearly opposed by the record before that court.

In conclusion of this point, since Petitioner did not discover the events or evidence pursuant to his present claim, that the NYPD does promote injured officers, simply to increase their medical pensions, until 1991 (Buckley), 1994 (McCormick and Flores) and 1995 (Gunn), that claim could not possibly be identical, therefore, to those in either *Hasenstab I or II*. Moreover, since *Hasenstab II* had concluded in 1987, and the motion court action became final in 1990, that claim could not have been raised in either of those proceedings. For all of the foregoing reasons, *Hasenstab I and II* could not, properly, be res judicata bars to the present action.[8]

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[8]In support of this conclusion, there was both an intervening state court judgment and "judicial" change in New York law, subsequent to *Hasenstab II* which precluded Petitioner from obtaining relief in the state forum for his federal grievances.

## PETITIONER'S FEDERAL PROPERTY INTERESTS, AND THE EFFECT OF THE JUDICIAL CHANGE IN NEW YORK LAW.

Petitioner's federal interests stem from the NYPD's promotions of injured officers, which were undertaken to increase the medical pensions of some officers, while others were permitted to remain with the department thereafter. The authority for these interests is grounded in this Court's decision of *Perry v. Sinderman*, 408 U.S. 593 (1972) and its progeny. "Agreements implied from the defendant's conduct, in the light of the surrounding circumstances, may be sufficient to constitute a protected property interest." *Perry*, *supra* at 602. *See, also, Paskvan v. City of Cleveland, et al.*, 946 F.2d 1233, 1236 (6th Cir. 1991) and *Drogan v. Ward*, 675 F. Supp. 832 (S.D.N.Y. 1986).

However, the courts of New York refused to recognize these asserted rights, simply because they had held that the successful completion of a civil service examination does not create a property interest and that any such interest would be limited by the life of one's eligible list. *Deas v. Levitt, supra* at 532. The state courts' inadequacies to find Petitioner's "federal" property rights and their resultant failures to safeguard those interests, owing to *Deas*, *supra*, is clearly omissive of sound, substantive state rules to have determined the merits of his claims in that forum, which runs contrary to, and undermines accepted principles of due process.[9]

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[9]*Deas v. Levitt, supra*, undermines this Court's decision of *Parratt v. Taylor*, 451 U.S. 527 (1981). In *Parratt, supra*, this Court recognized that postdeprivation remedies can satisfy the Due Process Clause. That in such cases, the normal predeprivation notice and opportunity to be heard is pretermitted, if the state provides an adequate postdeprivation remedy. *Id.* at 538. In the case at bar, Petitioner was denied predeprivation notice and

The effect of that change in New York judicial law, owing to *Deas*, *supra*, is far-reaching. Because New York courts are no longer able to adjudicate federal questions identical to Petitioner's, the state has deferred resolution of his claims to federal forum, which presupposes, in matters identical to Petitioner's, that federal courts can no longer conclude as a principle of federal preclusion, that litigants in "subsequent" federal forum could have raised their federal claims in state proceedings and have had them adjudicated therein; owing to *Deas, supra,* and which opposes the *Hasenstab II* court's finding and runs contrary to the Full Faith and Credit Clause of the United States Constitution, as to this issue. Wherefore, Petitioner contends that Respondents' asserted right to that Constitutional refuge is annulled. *See Miagra v. Warren City School District*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.E.2d 56 (1984); 28 U.S.C. §1738.

Citing *Metromedia Co. v. Fugazy, supra*, as its authority, the Second Circuit held that Petitioner's prior state and federal actions barred his instant claims and that the issues had been adjudicated in those proceedings. App. at 5-6. Plainly, Petitioner's claim "to a higher medical pension" was neither raised nor litigated in either *Hasenstab I or II.* The events which gave rise to that claim (pursuant to Buckley, McCormick, Flores and Gunn) took place subsequent to *Hasenstab II* and the motion court action.

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an opportunity to be heard, pursuant to the taking of his property. Because the state courts herein, could not award Petitioner the relief sought, owing to *Deas, supra*, Respondents are not free from liability under the Due Process Clause. Petitioner pleaded no adequate remedy in both the district court and the Second Circuit.

Herein, not only did the facts change since *Hasenstab II* took place, there was a judicial change in the applicable legal rules. *Deas v. Levitt, supra.* It is well settled that courts should decline to give preclusive effect to a prior judgment, if there have been changes in the applicable legal rules or the factual predicates essential to that prior judgment. *See U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 719 (2d Cir. 1993); *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). Accordingly, the Second Circuit ignored a prior ruling of this Court, as well as its own.

Clearly, *Deas v. Levitt, supra*, effected a sharp departure from "prior" state appellate courts' rulings (see P.6, herein), which poses a significantly different legal standard pursuant to resolution of the issues herein, as opposed to those in *Hasenstab II.* Accordingly, the issues herein could not possibly be identical to and precluded by those in *Hasenstab II. See Metromedia Co. v. Fugazy, supra* at 365. In keeping with the foregoing principles of collateral estoppel, *Hasenstab II* could not bar the issues presented herein.

Although the record before that court clearly opposed its finding, the Second Circuit concluded that Petitioner is suing in the present case, under the same set of operative facts as existed in *Hasenstab I* and that the issues were adjudicated in that action. App. at 5-6.

Petitioner's claim to a higher medical pension could not possibly have been adjudicated in the state proceedings, irrespective of those courts' inabilities to have found his asserted, federal property interest, because, as Respondents tersely disputed to the Appellate Division and New York Court of Appeals, the proofs of that claim were not part of the records before those courts (see P.7-8, 11, herein). Owing to

the chronologies of their discoveries by Petitioner (Buckley, 1991; McCormick, 1994), and the occurrences of the other events (Flores, 1994; Gunn, 1995), all of which occurred after the motion court action had concluded and the Appellate Division briefs were submitted.

Given that *Deas, supra*, precluded the state courts from finding that Petitioner possessed a federal interest in promotion to sergeant, it is indisputable that they lacked the subject matter jurisdiction to adjudicate his claims therein. Looking to New York law for preclusionary attachments, it is well settled that a claim is not barred in a subsequent action, if the court in which the first action was brought lacked the subject matter jurisdiction to adjudicate that claim. *See Salwen Paper Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 72 A.D.2d 385, 391, 424 N.Y.S.2d 918, 922 (2d Dep't. 1980); *Mural Arts, Inc. v. Sonsand*, 82 N.Y.S.2d 153, 154-155 (Sup. Ct. Kings Co. 1948); *Restatement, Second, of Judgments* §26(1)(c)(1982); *Weinstein-Korn-Miller New York Civil Practice* 5011.18 at 50-140 (1985). *See, also, Marresse v. American Ac. of Orthopaedic Surg.*, 105 S.Ct. 1327, 1333 (1985); *U.S. (Drug Enforcement Agency) v. One 1987 Jeep*, 972 F.2d 472, 479 (2d Cir. 1992); *Lacks v. Fahmi*, 623 F.2d 254, 256 (1980).

Moreover, under New York law the bar against later claims based upon the same cause of action is subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation. *See Davidson v. Capuano*, 792 F.2d 275, 278 (2d Cir. 1986).

In the case at bar, Petitioner prevailed in his state action, but was subsequently barred from obtaining the relief he sought therein; *Deas, supra*, barred the "primary" relief

sought. And since damages against public bodies, or officers acting in their official capacities, can only be obtained if incidental to the primary relief, Petitioner could not obtain damages against the parties sued, in their individual capacities. *See* CPLR §7806. In the very least, Petitioner is seeking damages herein, which he could not obtain in the Article 78 action. The Second Circuit ignored Petitioner's demand for the relief provided for in its decision of *Davidson, supra*. Based upon the foregoing principles, New York law would not bar a subsequent action identical to Petitioner's, although *Deas, supra*, would swallow the protected federal interest at issue, by precluding the relief sought as the precise consequence of the expiration of one's eligible list.

New York law is well settled in the regard that the issue to which preclusion is sought, must be identical with the issue decided in the prior proceeding. *Capital Telephone v. Pattersonville Telephone Co.*, 56 N.Y.2d 11, 17, 451 N.Y.S.2d 11, 13, 436 N.E.2d 461, 463 (1982); and that issues are not identical when the standards governing them are significantly different. *Capital Telephone, supra,* 56 N.Y.2d at 18-19, 451 N.Y.S.2d at 14-15, 436 N.E.2d at 464-465; *Strizak v. Board of Regents of the University of the State of New York*, 29 A.D.2d 1013, 289 Misc.2d 148, 149, 465 N.Y.S.2d 403, 404 (Sup. Ct. Saratoga Co. 1983).

In conclusion of this point, the standard of proof governing the resolutions of the issues in the instant action, is significantly different from that of the state courts. Herein, that standard is measured by a fair preponderance of the evidence. Whereas, in the state Article 78 action, the weight is that of arbitrariness and capriciousness. Pursuant to the foregoing principles, *Hasenstab I* could not be a bar to the claims and issues raised in the present action.

Although abridgment of Petitioner's due process rights has been the thrust of his appeal thus far, this matter presents a proportionate abridgment of Petitioner's federal equal protection franchise, the matrix of which was Petitioner's involuntary appearance before the NYPD's Medical Board, which was the precursor to the NYPD's refusal to promote him to sergeant even though the other injured officers were treated differently.

In closing, the case at bar was wrongly decided by the district court due to its misapprehension of the facts and its failure to observe properly stated rules of law, which the district court exacerbated when it rejected Petitioner's demand for relief from its judgment, even though he had put forth to the court, clear and convincing proof of its errors. Thereafter, the Second Circuit sanctioned the district court's actions with its affirmance of its judgment and rejection of Petitioner's soundly demonstrated demand for rehearing. Both the Second Circuit and the district court annulled the indispensable processes the Petitioner invoked to protect his due process rights to challenge erroneous decisions of those courts, pursuant to their abridgments, *supra*, which Petitioner contends is the epitome of due process denied. This Court must compel obedience of its prior decisions and set aside the egregious abridgments of Petitioner's fundamental due process rights, as set forth herein.

Petitioner prays that this Court will not let stand these imprudent departures from the accepted and usual judicial proceedings by the Second Circuit and district court in its determination of his case. Whereas the Second Circuit annulled his appellate remedy and Petitioner has no other remedy at law. Absent this Court's intervention, he will suffer an egregious injustice. Should Petitioner's matter require further proceedings, he will retain legal counsel.

## RELIEF SOUGHT

**Should the Court award summary disposition**

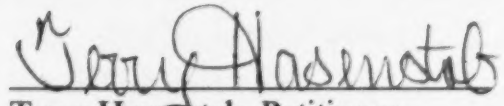
Petitioner seeks herein, compensatory damages equal to the higher medical pension he was deprived of and his lost benefits with retroactive effect and accrued interest; the payment of which is payable from the Article Two Police Pension Fund; presently reported to be in excess of twelve billion dollars.

## CONCLUSION

Summary disposition should be granted, based upon the merits of the within petition. Or, a writ of certiorari issue and the judgment be reversed.

Dated: September 11, 1996

Respectfully submitted,



Terry Hasenstab, Petitioner
42 Peconic Drive North
Massapequa, New York 11758
(516) 795 3877

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventeenth day of January one thousand nine hundred and ninety-six.

PRESENT:

Honorable Ellsworth A. Van Graafeiland,
Honorable Roger J. Miner,
Honorable Jose A. Cabranes,
*Circuit Judges.*

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TERRY HASENSTAB
*Plaintiff-Appellant,*

ORDER
# 95-7525

v.

THE CITY OF NEW YORK, et al.
*Defendants-Appellees.*

(Filed Jan. 17, 1996)

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APPEARING FOR APPELLANT: Terry Hasenstab, *pro se*, Massapequa, NY.

APPEARING FOR APPELLEE: Jane S. Earle, Assistant Corporation Counsel, New York NY.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

This cause came on to be heard on the transcript of record and was argued *pro se* by appellant and submitted by appellees.

Plaintiff-appellant Terry Hasenstab appeals from judgments entered in the United States District Court for the Southern District of New York (Knapp, J.), dismissing his civil rights action pursuant to Fed. R. Civ. P. 12(b)(6), and denying his motion for reconsideration and permanently enjoining him from filing any related suits in federal court.

On August 31, 1993, Terry Hasenstab, a retired New York City Police Officer, filed this civil rights action in the United States District Court for the Southern District of New York. The complaint named as defendants, the City of New York and various municipal officials, including current and former mayors and corporation counsels, in their official and individual capacities. Hasenstab sought, *inter alia*, $1,000,000 in damages.

The complaint arose out of events relating to Hasenstab's retirement from the New York City Police Department (the "NYPD") on disability in August of 1983. Hasenstab joined the NYPD at the rank of patrolman in 1964. In 1978, he took a civil service examination, hoping to secure a promotion to the rank of sergeant. Hasenstab later was notified that he had failed the exam. In May of 1982, Hasenstab was seriously injured while on duty. He subsequently left work on extended sick leave. On August 31, 1983, Hasenstab was awarded disability retirement.

Meanwhile, the 1978 examination that Hasenstab had taken was rescored. A new eligibility list of those passing the 1978 exam, including Hasenstab, was published on September 9, 1983. On September 15, 1983, Hasenstab was informed that he had passed the exam. However, other newly passing candidates had been informed on August 22, 1983, that they had passed the exam.

In January of 1984, Hasenstab commenced a special proceeding in New York State Supreme Court pursuant to Article 78 of the New York Civil Practice Law and Rules, seeking retroactive promotion to sergeant and retirement benefits commensurate with that rank. ("*Hasenstab I*"). Hasenstab claimed that the NYPD's failure to notify him that he had passed the 1978 exam before his retirement was arbitrary and capricious. The court dismissed Hasenstab's action, finding the NYPD's action neither arbitrary, capricious, nor an abuse of discretion.

Hasenstab then commenced an action pursuant to 42 U.S.C. §1983 in the United States District Court for the Southern District of New York ("*Hasenstab II*"), claiming that the NYPD's actions deprived him of his due process rights. The district court dismissed Hasenstab's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Applying New York law, the district court found that Hasenstab's claims arose from the same set of operative facts as *Hasenstab I*, and either were or could have been raised in *Hasenstab I*. The court, accordingly, found that res judicata barred Hasenstab's claims and dismissed his complaint. Hasenstab did not appeal this determination.

In January of 1988, the New York State Supreme Court granted Hasenstab's motion to renew his Article 78 petition (*Hasenstab I*), and he presented new allegations that

other police officers had been promoted while on sick leave. However, the court again dismissed Hasenstab's action, finding that the eligibility list had expired and Hasenstab could not assert any interest in an expired eligibility list under *Deas v. Levitt*, 73 N.Y.2d 525, 539 N.E.2d 1086, 541 N.Y.S.2d 958, *cert. denied*, 493 U.S. 933 (1989). Hasenstab appealed, and the Appellate Division affirmed (3 to 2). *Hasenstab v. McGuire*, 178 A.D.2d 217, 577, N.Y.S.2d 598 (1st Dep't, 1991), *aff'd*, 80 N.Y.2d 812, 600 N.E.2d 620 (1992), *cert. denied*, 113 S.Ct. 1947 (1993).

Thereafter, Hasenstab instituted the present action in the district court alleging, *inter alia*, that: (1) the NYPD violated his rights to equal protection and due process by selectively promoting some disabled officers but not others; and (2) the NYPD denied him procedural due process by failing to notify him that he would not be promoted or to afford him an opportunity to oppose the decision not to promote him. On August 12, 1994, the district court dismissed Hasenstab's complaint pursuant to Fed. R. Civ. P. 12(b)(6), finding, *inter alia*, as a result of *Hasenstab II*, his claims relating to the promotion were barred by *res judicata* and collateral estoppel.

On April 21, 1995, the district court denied Hasenstab's motion for relief from judgment and permanently enjoined him from filing any related actions in federal court, except for appealing the district court's order or responding to any applications made by defendants. Hasenstab appealed the August 12, 1994 and April 21, 1995 orders of the district court.

On appeal, Hasenstab argues, *inter alia*, that the district court erred in finding that res judicata and collateral

estoppel barred his claims concerning the NYPD's failure to promote him. We reject this argument.

Res judicata operates as a bar to subsequent actions involving the same transaction, where the same evidence is relied upon, and where the facts essential to the second action were present in the first. *See NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983). In addition, in order for res judicata to apply, there must exist between the two actions an identity of parties, and the prior judgment must have been rendered on the merits. *See Alpert's Newspaper Delivery Inc. v. New York Times Co.*, 876 F.2d 266, 270 (2d Cir. 1989).

In the present case, Hasenstab is suing the same parties under the same operative set of facts as existed in *Hasenstab II*. The district court's dismissal of *Hasenstab II* pursuant to Fed. R. Civ. P. 12(b)(6) was a judgment on the merits. Moreover, in *Hasenstab I*, which also involved the same parties and the same set of operative facts, the Appellate Division rejected the same causes of action presented in the instant action. Therefore, the district court properly determined that res judicata barred Hasenstab's claims.

We also believe that the district court properly determined that Hasenstab's claims were barred by collateral estoppel. "The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue in the prior proceeding . . . ." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 2445 (1993). Because the issues were adjudicated in his prior state and

federal actions, the district court did not err in finding that Hasenstab was collaterally estopped from raising those issues once again.

We have considered Hasenstab's remaining contentions, and we find them all to be without merit.

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland,

/s/ Roger J. Miner
Hon. Roger J. Miner,

/s/ Jose A. Cabranes
Hon. Jose A. Cabranes,

Circuit Judges.

FROM CLERK OF COURT
1-18-96

**NB: THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TERRY HASENSTAB
Plaintiff,

-against-

MEMORANDUM
AND ORDER
93 CIV. 6127
(WK)

THE CITY OF NEW YORK, et al.,

Defendants.

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This is an action brought under U.S.C. §1983, §1985, and §1986, and the Americans with Disabilities Act (42 U.S.C. §12101-§12212) relating to the retirement of plaintiff from the New York City Police Department and several state and federal cases subsequently brought by plaintiff against numerous defendants. Defendants now move for dismissal pursuant to Rule 12(b)(6) of the Fed. R. Civ P. on the ground that the complaint fails to state a claim upon which relief may be granted. For the reasons stated below, defendants' motion for dismissal of the complaint is granted.

The factual background of this case is summarized in *Hasenstab v. City of New York* (S.D.N.Y., 1987), 664 F. Supp. 95, 96-97 ("*Hasenstab Fed. I*"), familiarity with which is presumed. Plaintiff's first activity was to file an Article 78 petition in state court. That petition was dismissed on October 3, 1984, reargued in State Supreme Court, and again dismissed on September 7, 1990.[1] Thereafter, plaintiff appealed to the Appellate Division (1st Dep't, 1991), 577

N.Y.S.2d 598, and the New York State Court of Appeals (1992), 587 N.Y.S.2d 893, and was denied *certiorari* (1993), ___U.S.___, 113 S.Ct. 1947. During the pendency of the state case, plaintiff commenced another action before Judge Kram in federal court, *Hasenstab Fed. I.*

Plaintiff's instant action combines an attempt to relitigate issues that were decided in *Hasenstab Fed. I* with new claims against several Assistant Corporation Counsel and Corporation Counsel who were involved in plaintiff's past state and federal cases.

Plaintiff's first and second claims are identical to those raised in his previous federal case and are therefore dismissed under the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). Under the doctrine of res judicata, a "final judgment on the merits of an action precludes the same parties from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores v. Moite* (1981), 452 U.S. 394, 398. Because Judge Kram reached a decision in *Hasenstab Fed. I*, based on the merits, to dismiss these same claims, these causes of action against the defendants named in that case are precluded under res judicata.

Turning to collateral estoppel, according to the Second Circuit, in *Metromedia Co. v. Fugazy* (2d Cir. 1992), 983 F.2d 350, 365:

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[1] See *Hasenstab v. McGuire* (N.Y. App. Div., 1st Dep't, 1991), 577 N.Y.S.2d 598, 600.

> The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue in the prior proceeding and the decision was necessary to support a valid and final judgment on the merits.

Because the decision in *Hasenstab Fed. I* was based on the full and fair litigation of these same claims, the doctrine of collateral estoppel also precludes plaintiff from relitigation of these issues against new defendants.

Plaintiff has alleged that these issues were not fully and fairly litigated in *Hasenstab Fed. I* because he has discovered new evidence -- Plaintiff's Exhibits C, E, and F -- that he claims had been unavailable to him during the previous federal and state cases. We find, however, that those exhibits have no bearing on any part of the decision reached by Judge Kram.[2]

The claims against several Assistant Corporate Counsel and Corporate Counsel for New York City are dismissed under the doctrine of absolute immunity. Government litigators enjoy absolute immunity in regard to "activities that can fairly be characterized as closely associated with the conduct of litigation or potential

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[2] Because these claims are precluded under res judicata and collateral estoppel based on the earlier federal case, we need not reach the question of whether these claims are also precluded under res judicata and collateral estoppel based on plaintiff's state judgment, nor whether the claims are time barred.

litigation." *Barrett v. United States* (2d Cir. 1986), 798 F.2d 565, 572. See also *Spear v. Town of West Hartford* (2d Cir. 1992), 954 F.2d 63, 66. Plaintiff's claims are based on the actual court statements from previous litigation, activities that are not only "closely associated" with litigation but actually part of the litigation itself. Therefore, these defendants are protected by absolute immunity.

Despite plaintiff's allegations, there is no suggestion of intentional withholding of evidence by the defendants in their conduct of the previous litigation. The worst that could be said is that some of the lawyers might have made an erroneous statement to a state or federal court. Furthermore, even if plaintiff's allegations were true, absolute immunity would still apply: "the withholding of evidence...does not create liability in damages." *Taylor v. Kavanagh* (2d Cir. 1981), 640 F.2d 450, 452.

Plaintiff makes several other claims that are unsupported by the law, and are therefore dismissed. Plaintiff has no standing and this Court has no jurisdiction with regard to plaintiff's third and fourth claims that *Deas v. Levitt* (N.Y. Ct. App.), 73 N.Y.2d 525, 541 N.Y.S.2d 958, *cert. den.* (1989), 493 U.S. 933 was wrongly decided. *See Asarco Inc. v. Kadish* (1989) 490 U.S. 606, 622. Plaintiff's claim based on the Americans with Disabilities Act is dismissed because it is based on actions that occurred no later than September 1983, yet the Act did not become effective until July 26, 1992. *See Verdon v. Consolidated Rail Corp.* (S.D.N.Y. 1993), 828 F. Supp. 1129, 1140-41.

For the reasons noted above, defendants' motion to dismiss the complaint in its entirety is hereby granted."

SO ORDERED
July 25, 1994
New York, New York

/s/ Whitman Knapp
Whitman Knapp, Senior U.S.D.J.

Entered on the 15, day of August, 1994.

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the nineteenth day of March one thousand nine hundred and ninety-six.

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Dkt No: 95-7525

Hasenstab

Appellant,

(Filed Mar. 19 1996)

v.

The City of New York

Appellee.

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A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant pro se Terry Hasenstab.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**ENDORSEMENT**

*Terry Hasenstab, Plaintiff v. The City of New York, et al., Defendants, 93 Civ. 6127 (WK)*

KNAPP, SENIOR D. J.

Plaintiff's motion pursuant to Fed. R. Civ. P. 60(b) for relief from the judgment of August 15, 1994 dismissing the complaint, being without merit, is hereby denied.

Additionally, finding that plaintiff will likely pursue further onerous and baseless litigation, we permanently enjoin him from: (1) proceeding further in this action except to (a) seek appellate review by the Court of Appeals, (b) apply for *certiorari* to the Supreme Court, and (c) submit papers responding to applications, if any, by defendants; and, (2) instituting in any federal court any new action, motion, petition or proceeding arising from or related to plaintiff's medical disability retirement as a police officer on August 31, 1983 or to the New York City Police Department's decision not to promote him to sergeant at that time.

SO ORDERED.
April 20, 1995.

/s/ Whitman Knapp
Whitman Knapp,
Senior U.S.D.J.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of constitutional and statutory provisions involved in this case are:

1. Fourteenth Amendment To The United States Constitution:

"No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

2. 28 U.S.C. §1343:

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in §1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in §1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal

rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

3. 42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. 42 U.S.C. §1985:

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or

property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

5. 42 U.S.C. §1986:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in §1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action....

6. N.Y. Civil Service Law §50(4):

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

7. N.Y. Civil Service Law §50(10):

....Determination of physical or mental disability shall be made by a medical officer employed or selected by the civil

service department or the municipal commission having jurisdiction..

8. N.Y.C. Administrative Code §13-206(d):

Any member, within thirty days after receipt of the decision by the Medical Board may request that the Medical Board's determination be reviewed by a special medical board, which shall consist of one doctor of the Medical Board, and a doctor selected and compensated by such member.

9. Rule 4.3.2 of the N.Y.C. Personnel Director:

Any physical or mental disability, disease, injury, abnormality, defect or the history thereof, which renders a person unfit for the performance of the duties of the position the person seeks, or the failure to meet the required medical or physical standards of a position, shall constitute grounds for the disqualification of such person.